

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAVID M. GORDON)	
Claimant)	
)	
VS.)	
)	
SM & P UTILITY RESOURCE, INC.)	
Respondent)	Docket No. 268,105
)	
AND)	
)	
AMERICAN HOME ASSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requested review of the October 13, 2004 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on March 29, 2005.

APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. Matthew S. Crowley, of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that the Award calculation paragraph should be modified to reflect that 113.53 weeks of temporary total disability compensation paid at the rate of \$401 per week equals \$45,525.53. In addition, the parties agreed that the first sentence in footnote one in the Award contains a typographical error and should read permanent partial disability instead of permanent total disability.

ISSUES

The disputed issue before the Administrative Law Judge (ALJ) was the nature and extent of disability. Specifically, whether claimant was entitled to a whole body disability or limited to a scheduled disability to the left shoulder.

The ALJ determined that as a result of claimant's work-related injuries he suffered a 12 percent permanent partial functional impairment to his left shoulder. The ALJ rejected claimant's allegations of additional injury to his thoracic spine, with a whole person impairment as a result of surgical scars or as a result of psychological impairment.

The claimant requests review of the nature and extent of disability. Claimant argues the ALJ erred in failing to include as part of his functional impairment a percentage of impairment to the whole person as a result of scarring and disfigurement due to his shoulder surgeries. Claimant further argues he suffered a back injury and because of his injuries also developed a psychological impairment. Consequently, claimant concludes he suffered a whole person impairment and is entitled to a work disability award of 70.5 percent based upon a 67 percent wage loss averaged with a 74 percent task loss.

Conversely, respondent argues that during the extended treatment the claimant received for his shoulder he was never diagnosed with a thoracic spine injury by the treating physicians. Respondent further argues that unlike claimant's expert, its expert conducted objective testing regarding claimant's psychological condition, and that the ALJ appropriately adopted the more persuasive evidence in concluding claimant did not suffer a psychological impairment. Finally, respondent argues that neither the court ordered independent medical examiner nor its expert concluded a rating for claimant's surgical scar was appropriate. Consequently, respondent requests that the Board affirm the ALJ's Award finding claimant to be limited to his scheduled disability to the left shoulder. However, at oral argument before the Board the respondent raised the issue of whether the K.S.A. 44-510f(a)(4) limit was applicable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began working as a utility locator for the respondent in November of 2000. Claimant's job was to locate and isolate utility lines such as telephone, electric and gas. On June 10, 2001, the claimant fell and injured his left shoulder and back when he was putting a lid back on a manhole. Ultimately, on August 29, 2001, Dr. Jeffrey C. Randall performed arthroscopic surgery on the claimant's left shoulder. The claimant continued to have instability in his shoulder and on April 30, 2002, Dr. Randall performed a second open surgery on claimant's left shoulder.

After the first surgery, claimant testified he signed a leave of absence form (approximately six months), but was then terminated in either September or October 2001. Claimant was off work and continued to be off through February 2002, when Dr. Randall released him. Claimant testified he looked for work after he was terminated, and also started school in January 2002 at Bryan Career College.

On December 18, 2003, claimant began working for Baby Dolls as a bouncer/doorman. His job duties were to collect fees, check identifications, tell people to leave when they were too intoxicated, take out the trash, carry buckets of ice and stock the alcohol. On March 3, 2004, claimant began to work for his father who purchased a restaurant. For the first couple of weeks he worked from 10 a.m. until 10 p.m. Now he works from 10:30 a.m. until 2 p.m. and then returns again at 4 p.m. until closing. Claimant cooks the hamburgers, and serves the ice cream and drinks. He also has to count the money and compare it to the receipts. Claimant has continued to look for jobs at hospitals, at the Bio-Medical Center, and the fire department, but was unable to pass the physical test.

At respondent's attorney's request, Dr. Chris D. Fevurly examined claimant on November 12, 2003. The claimant provided a history that he had fallen into a hole and dislocated his left shoulder. Dr. Fevurly diagnosed claimant with chronic left shoulder pain which resulted in two surgical repair procedures. Claimant also noted that he had developed mid-thoracic pain a few months before seeing Dr. Fevurly. The doctor noted claimant was injured on June 10, 2001, reported some mid-back pain on June 18, 2001, and by June 27, 2001, the back pain had resolved.

Utilizing the *AMA Guides* Fourth Edition, Dr. Fevurly rated claimant with a 12 percent left upper extremity impairment due to left shoulder instability. After examining photographs of the scar from claimant's last shoulder surgery he opined that claimant would probably not have a ratable condition. He testified:

Q. Would the pictures that you've seen, which we'll mark in a minute as Claimant's Exhibits A through F, qualify him for the first category or second, whichever one has a rating - -

A. Well, I - -

Q. - - as a minimal impairment?

A. Yeah, I think he's definitely Class I. The question really becomes does he have any signs and symptoms of skin disorder present or intermittently present from the scar. And, you know, I think that would be the question. Is this healed surgical scar a skin disorder, and I would say probably not. But that's just my interpretation of what that means. There definitely is a scar there, but I would consider that a normal result of the surgery and not a skin disorder.¹

And the doctor noted that during his physical examination of claimant there was no indication of tenderness or edema in the area of the scar.

Dr. Fevurly imposed permanent restrictions against lifting greater than 10 pounds above chest level with the left arm. No forceful twisting or pushing activity with the left arm

¹ Fevurly Depo. at 15-16.

above shoulder level and no ladder climbing. Utilizing the task list prepared by Dick Santner, a vocational expert, Dr. Fevurly opined claimant could no longer perform 12 of 47 tasks for a 26 percent task loss.

At the request of his attorney, claimant was examined by Dr. Daniel D. Zimmerman on February 17, 2004. Claimant complained of thoracic spine and left shoulder pain as a result of a fall at work on June 10, 2001. Dr. Zimmerman diagnosed chronic thoracic paraspinous myofascitis and a partial thickness rotator cuff tear involving the supraspinatus and left shoulder large Hill-Sachs lesion. He utilized the fourth edition of the *Guides* and rated claimant with a 14 percent permanent partial impairment to the left upper extremity at the level of the shoulder. He further rated claimant with a 5 percent permanent partial impairment to the whole person as a result of the chronic thoracic myofascitis. Finally Dr. Zimmerman rated claimant with an additional 3 percent permanent partial impairment to the whole person for the surgical scar.

Dr. Zimmerman imposed lifting restrictions of 50 pounds on an occasional basis and 25 pounds on a frequent basis. He noted claimant should avoid work activity at shoulder level or above on the left side, and further noted claimant should avoid frequent flexion, extension, twisting, torquing, pushing, pulling, hammering and reaching activities with the left upper extremity. Dr. Zimmerman then examined a task list prepared by Dick Santner, and determined claimant could no longer perform 34 of 47 tasks for a 72 percent task loss.

Dr. Zimmerman agreed that claimant's medical records contain a single complaint of upper back pain on June 18, 2001, followed by one reference to trunk mobility on June 29, 2001. He rated claimant's thoracic spine impairment based upon the single reference to pain contained in the June 18, 2001 medical record.

The ALJ entered an order for claimant to be examined by Dr. Peter V. Bieri. Dr. Bieri examined claimant on May 3, 2004. He rated claimant with a 12 percent permanent partial impairment to the left upper extremity at the shoulder level for residuals of shoulder instability and crepitance. He further concluded the medical records did not support a finding that claimant's thoracic spine complaints were related to his accidental injury on June 10, 2001. Dr. Bieri also noted that he was aware there were differing opinions regarding whether claimant suffered from an emotional behavioral disorder as a result of the accident. He opined that based upon his observation of claimant during the examination, claimant failed to meet the criteria for permanent impairment on the basis of behavioral or emotional alteration as a result of his accident.

Dr. Bieri did not provide a rating for claimant's surgical scarring. He noted:

Q. In Mr. Gordon's case, do you have an opinion as to whether Mr. Gordon qualified for a permanent impairment under the AMA guidelines for the scarring from a cosmetic standpoint?

MR. CROWLEY: Same objection.

A. I rendered no impairment for disfigurement. The Guide states specifically on page 279, with disfigurement there is usually no loss of body function or little or no effect on activities of daily living. Now, this would by definition exclude range of motion deficit because of the scarring, that is covered in another area. Nevertheless, disfigurement may impair by causing social rejection, unfavorable self image, self-imposed isolation, lifestyle alteration or other behavioral changes. So applying those to a scar on the shoulder which is surgically induced, I did not consider a disfigurement impairment.²

He did agree that if the scarring reduced the range of motion claimant could be rated at somewhere between 0 and 9 percent, and if claimant's scar contributes to his loss of range of motion his rating would be no more than 1 percent which is a whole person rating, but he concluded that he did not feel it was appropriate to assess any impairment for claimant's scar.

Dr. Zimmerman imposed restrictions consistent with a medium physical demand level, which would limit occasional lifting to 50 pounds, frequent lifting not to exceed 20 pounds, and no more than 10 pounds of constant lifting. Shoulder-level and overhead use of the left upper extremity is precluded.

At the request of his attorney, claimant was examined on July 22, 2003 and June 7 and 8, 2004 by Melvin R. Berg, PhD., a clinical psychologist. After the first visit with claimant, Dr. Berg diagnosed him with a major depressive disorder caused by his pain and inability to manage his life as well as he had before his injury. After his later interview with claimant, Dr. Berg concluded claimant's diagnosis was the same and he rated claimant with a 25 percent permanent partial impairment.

At the request of the insurance carrier, claimant was interviewed on February 16, 2004 by Dr. Patrick D. Caffrey, a licensed psychologist. Dr. Caffrey performs a diagnostic interview taking the history and then gives the Minnesota Multiphasic Personality Inventory test. He concluded the MMPI revealed claimant was "faking bad". Moreover, the doctor concluded claimant did not meet any of the DSM-IV criteria in order to have a psychological diagnosis, and that claimant did not suffer any type of traumatic neurosis.

Initially, it must be determined whether claimant suffered a scheduled injury to the left shoulder for which his entitlement to benefits would be pursuant to K.S.A. 44-510d(a)13, or whether he also suffered permanent impairment to his thoracic spine or as a result of his surgical scar, or for a psychological condition for which his entitlement to benefits would be pursuant to K.S.A. 44-510e.

The Act recognizes two different classes of injuries which do not result in death or total disability. An injured employee may suffer a permanent disability to a scheduled body

² Bieri Depo. at 31.

part or a permanent partial general disability.³ It is the situs of the disability, not the situs of the trauma, that determines which benefits are available.⁴ If the situs of the disability is to the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, the disability is considered a scheduled disability.⁵

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.⁶

The ALJ concluded that claimant's thoracic spine was not injured as a result of his work accident, and adopted the determination made by the court-ordered independent medical examiner that claimant's thoracic spine pain complaints were not related to his accident at work. Dr. Bieri made this determination in part because claimant did not complain of thoracic spine pain during his treatment, except on one occasion within a week of the accident. Thereafter, there were no notes in the medical records that claimant made further complaints of thoracic spine pain. Likewise, Dr. Fevurly limited his rating to claimant's left shoulder. Only Dr. Zimmerman rated claimant's thoracic spine complaints based upon the one reference to such complaints in the medical records. The Board affirms the ALJ's determination that claimant failed to meet his burden of proof that he suffered permanent impairment to his thoracic spine as a result of his work-related accident with respondent.

As a result of the second shoulder surgery, the claimant has an approximate four inch surgical scar. Claimant argues that he has a ratable whole person impairment for the scarring. Both Drs. Fevurly and Bieri concluded claimant does not have a permanent impairment as a result of the surgical scar. Conversely, Dr. Zimmerman opined claimant did have a minimal permanent impairment as a result of the scar. The Board finds the testimony of Drs. Bieri and Fevurly more persuasive and concludes claimant failed to meet his burden of proof that the surgical scar warrants a permanent impairment rating.

The Board agrees with the ALJ's finding that claimant's work-related injury was limited to his left shoulder, and adopts the ALJ's determination that claimant's functional impairment is 12 percent to the left shoulder and affirms the ALJ's Award.

The ALJ noted claimant neither requested, nor sought treatment for his alleged psychological condition and without treatment it would be difficult to conclude such condition, if any, was permanent.

³ K.S.A. 44-510d; K.S.A. 44-510e.

⁴ *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986).

⁵ K.S.A. 44-510d(a)(13).

⁶ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Dr. Berg concluded claimant suffered from a major depressive disorder. He based his diagnosis upon interviews with claimant. Conversely, Dr. Caffrey concluded claimant did not qualify for diagnosis and that he was “faking bad”. Dr. Caffrey administered tests to corroborate his opinion whereas Dr. Berg just relied upon what claimant told him. The court-ordered independent medical examiner was aware of the conflicting opinions and after observing claimant adopted Dr. Caffrey’s opinion that claimant did not suffer psychological disorder.

The Board concludes that Dr. Caffrey’s testimony is more persuasive and adopts the ALJ’s findings that claimant failed to meet his burden of proof that he sustained either temporary or permanent psychological impairment that is directly traceable to his work-related injury.

Finally, the Board will address the respondent’s issue of whether the ALJ correctly applied K.S.A. 44-510f(a)(4), which limits functional impairment awards. The ALJ noted in a footnote to the benefit calculation portion of the award, that the portion of the award paid for temporary total disability was not included in the \$50,000 limit under the statute. As the total award exceeded \$50,000 only when the benefits for temporary total disability and permanent partial disability were combined, the cap did not apply.

The language of K.S.A. 44-510f(a)(4) states in part:

(a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:

...

(4) for permanent partial disability, where functional impairment only is awarded, \$50,000 for an injury or aggravation thereof.

The language of K.S.A. 44-510f(a), in subsections (1), (2) and (3), specifically includes temporary total disability compensation when discussing the limits set forth in those sections of the statute. Only subsection (4) of K.S.A. 44-510f(a) does not include language discussing temporary total disability compensation.

One of the more common rules of statutory interpretation is that expressed in the Latin maxim *expressio unius est exclusio alterius*, i.e., the mention or inclusion of one thing implies the exclusion of another. This rule may be applied to assist in determining actual legislative intent which is not otherwise manifest, although the maxim should not be employed to override or defeat a clearly contrary legislative intention.⁷

⁷ *State v. Luginbill*, 223 Kan. 15, 574 P.2d 140 (1977) (quoting *In re Olander*, 213 Kan. 282, 515 P.2d 1211 [1973]).

. . . when legislative intent is in question, we can presume that when the legislature expressly includes specific terms, it intends to exclude any terms not expressly included in the specific list.⁸

The Board finds the language of K.S.A. 44-510f(a)(4) to be clear and unambiguous. The \$50,000 limitation applies to permanent partial disability awarded where functional impairment only is awarded. Temporary total disability compensation is not to be included in the \$50,000 limit. The Board, therefore, finds that the method of computing the award utilized by the ALJ was in compliance with the statute and is affirmed.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Brad E. Avery dated October 13, 2004, is modified in part to reflect that 113.53 weeks of temporary total disability compensation at \$401 per week equals \$45,525.53, but is otherwise affirmed in all other respects.

IT IS SO ORDERED.

Dated this _____ day of April 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
 Matthew S. Crowley, Attorney for Respondent and its Insurance Carrier
 Brad E. Avery, Administrative Law Judge
 Paula S. Greathouse, Workers Compensation Director

⁸ *Matter of Marriage of Killman*, 264 Kan. 33, 955 P.2d 1228 (1998) (citing *State v. Wood*, 231 Kan. 699, 647 P.2d 1327 [1982]).